Office-Supreme Court, U.S.
FILED
SEP 28 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 358

BUCKHEAD THEATRE CORPORATION,
Petitioner,

versus

ATLANTA ENTERPRISES, INC., et al,
Respondents.

GARDEN HILLS THEATRE CORPORATION,
Petitioner,

versus

ATLANTA ENTERPRISES, INC., et al,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT S. SAMS
TENCH C. COXE
Troutman, Sams, Schroder & Lockerman
1605 William-Oliver Building
Atlanta, Georgia 30303
W. COLQUITT CARTER
Bryan, Carter, Ansley & Smith
Citizens & Southern National Bank Bldg.
Atlanta, Gorgia 30303

TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED	1
ARGUMENT	
I THE PARAMOUNT DECREES CREATED NO ESTOPPEL IN THESE ACTIONS	
The Paramount Case	3
The Questions In These Actions In Respect of Run and Clearance Were Not Determined in the Paramount Case	4
The Paramount Case Adjudicated Nothing As To The Damage Period In These Actions	6
None Of The Exhibitor Defendants In These Actions Was A Defendant In The Paramount Case	6
II EVEN IF ADMISSIBLE, THE DECREES TOGETHER WITH THE OTHER EVIDENCE DO NOT PERMIT THE SUBMISSION OF COUNT I TO A JURY	8
III PETITIONERS' REASONS FOR THE GRANT OF THE WRIT OF CERTIORARI ARE WITHOUT MERIT	
There Is No Conflict Among The Circuits As To The Interpretation Of This Court's Opinion In Theatre Enterprises	9

Page

The Result Reached In These Actions Does Not Circumvent The Paramount Decrees 12

The Result Reached In These Actions Follows the Mandate Of Congress 13

TABLE OF CASES CITED

Buckhead Theatre Corporation, et al v. Atlanta Enterprises, Inc., et al, 327 F. 2d 365 (5th Cir. 1964) 2, 5

Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 190 F. 2d 951 (2nd Cir. 1951), cert. den. 342 U. S. 926 (1952) 7

Emich Motors v. General Motors Corporation, 340 U. S. 558 (1951) 3

International Shoe Machine Corp. v. United Shoe Machinery Corp., 315 F. 2d 449 (1st Cir. 1963), cert. den. 375 U. S. 820 (1964) 6, 11

Krulewitch v. United States, 336 U. S. 440 (1949) 6, 7

Orbo Theatre Corporation v. Loew's Incorporated, 156 F. Supp. 770 (1957), aff'd 261 F. 2d 280 (1958), cert. den. 359 U. S. 943 (1959) 11

Paramount Film Distributing Corp. v. Village Theatres, Inc., 228 F. 2d 721 (1955) 7, 11

Park Neponset Corporation v. Smith, 258 F. 2d 452 (1st Cir. 1958) 5, 11

CASES CITED (Continued)

Page

Partmar Corp. v. Paramount Theatres Corp., 347 U. S. 89 (1954) 3

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U. S. 537 (1954) 3, 5, 6, 9

United States v. Paramount Pictures, Inc., et al, 66 F. Supp. 323 (S.D.N.Y. 1946), aff'd in part and rev'd in part, 334 U. S. 131 (1948); opinion on remand, 85 F. Supp. 881 (S.D.N.Y. 1949) 1, 3, 4, 5, 7

Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 263 F. 2d 533 (2nd Cir. 1959) 11

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 1964

No. 358

BUCKHEAD THEATRE CORPORATION,
Petitioner,

versus

ATLANTA ENTERPRISES, INC., et al,
Respondents.

GARDEN HILLS THEATRE CORPORATION,
Petitioner,

versus

ATLANTA ENTERPRISES, INC., et al,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE QUESTIONS PRESENTED

These actions were brought under the Anti Trust laws. The petition for a writ of certiorari raises the question whether Section 5 of the Clayton Act required the admission into evidence in Count I of each of these actions of portions of the judgments in a prior Government action entitled *United States v. Paramount Pictures, Inc., et al* (hereinafter referred to as "the *Paramount* case"), 66 F. Supp. 323 (S.D.N.Y. 1946), aff'd in part and rev'd in part, 334 U.S. 131 (1948); opinion on remand, 85 F. Supp. 881 (S.D.N.Y. 1949). The trial

court rejected the Paramount judgments and its decision was affirmed by the United States Court of Appeals for the Fifth Circuit. *Buckhead Theatre Corporation, et al v. Atlanta Enterprises, Inc., et al*, 327 F. 2d 365 (5th Cir. 1964).

A second and subsidiary question raised is whether, even if admissible, the *Paramount* judgments together with the other evidence would have been sufficient to warrant submission to the jury of Count I in each action.

Each of the instant suits was filed in three Counts. Count I alleged a nationwide conspiracy. Count II alleged a local conspiracy "other than and different from" the national conspiracy, but the same conduct is alleged in support of each conspiracy. Count III alleged a theatre monopoly. The trial court directed a verdict for respondents on Count I. Counts II and III were submitted to the jury, which returned a verdict for respondents. The petition for certiorari pertains only to Count I.

The basic question here raised is simply this: Did the *Paramount* judgments create an estoppel in these actions? Respondents will show that because of the difference in issues, time periods, and in parties, the *Paramount* case did not create an estoppel here.

Respondents will show, in addition, that even if admissible, the *Paramount* judgments with the other evidence could not establish a nationwide conspiracy during the damage period in these actions, and thus could not require the submission of Count I to the jury.

Respondents will show, finally, that there is no conflict among the circuit courts which have interpreted this Court's decision in *Theatre Enterprise, Inc. v. Paramount Film Distributing Corporation*, 346 U. S. 537, 543 (1954), as it relates to the basic question here raised, and that none of the reasons advanced by petitioners in support of their petition has any merit whatsoever.

ARGUMENT

I

THE PARAMOUNT DECREES CREATED NO ESTOPPEL IN THESE ACTIONS.

This Court has made it clear that the evidentiary use which may be made under Section 5 of a prior Government judgment is "to be determined by reference to the general doctrine of estoppel" and that such "estoppel extends only to 'questions distinctly put in issue and directly determined' in" the prior proceeding. *Emich Motors v. General Motors Corporation*, 340 U. S. 558, 568, 569 (1951). See also *Partmar Corp. v. Paramount Theatres Corp.*, 347 U.S. 89, 102 (1954).

The Paramount Case

In *United States v. Paramount Pictures, Inc.*, (supra), the Government sued the eight major motion picture companies and the theatre-operating affiliates of five of them. The suit, instituted in 1938, came to trial in 1945. The evidence related to 1945 and prior years. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corporation*, 346 U. S. 537, 543 (1954). The District Court

agreed with the Government that the defendants had conspired on a national basis to restrain trade through the commission of various illegal practices (66 F. Supp. 323).

In 1946 the defendants were enjoined from further commission of practices held to be illegal (70 F. Supp. 53, 72). On May 3, 1948, this Court substantially affirmed the District Court's judgment, remanding for reconsideration of the relief to be granted (334 U. S. 131). Subsequent proceedings left undisturbed the portions of the judgment of the District Court relative to runs and clearances, upon which petitioners here rely. (See *United States v. Paramount*, 85 F. Supp. 881, 897.)

The Questions In These Actions In Respect Of Run And Clearance Were Not Determined In The Paramount Case.

The District Court in the *Paramount* case found that the defendants were guilty of "conspiring with each other to maintain a nationwide system of runs and clearances which is substantially uniform in each local competitive area." (70 F. Supp. 53 at 72) and enjoined them from agreeing "to maintain a system of clearances. . . ." (70 F. Supp. 53 at 73). There was no adjudication, however, that any particular local system of runs and clearances was illegal. The District Court clearly indicated that local issues in respect of runs and clearances were not being adjudicated:

> ". . . The decision of such controversies as may arise over clearances should be left to local suits in the area concerned. . . ." *United States v. Paramount*, 66 F. Supp. 323, 342.

In respect of possible discrimination as to admission prices or clearances the District Court said, at 66 F. Supp. 323, 353:

> ". . . They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of operators. . . ."

Thus, in the absence of evidence as to the character of specific communities, theatres, theatre operators, and theatre patronage, the Court felt that it could not pass upon the legality of the runs and clearances in specific localities.

As the Fifth Circuit Court noted (*Buckhead Theatre Company, et al v. Atlanta Enterprises, Inc., et al*, 327 F. 2d 365, 368), the crux of the charge against respondents here is the alleged continuation into the damage period in these actions (1952-1961) of the Atlanta system of runs and clearances, claimed to have been adjudicated illegal in the *Paramount* case. But the Paramount case adjudicated nothing in respect of Atlanta runs and clearances, and that portion of the decree relative to runs and clearances creates no estoppel here. See *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537, 543 (1954); *Park Neponset Corporation v. Smith*, 258 F. 2d 452, 456 (1st Cir. 1958).

The Paramount Case Adjudicated Nothing As To The Damage Period In These Actions.

The adjudication in the *Paramount* case relates to 1945 and prior years. Petitioners here seek damages alleged to have been incurred during 1952-1961. Due to the difference in time periods, no estoppel can be created. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537 (1954); *International Shoe Machine Corp. v. United Shoe Machinery Corp.*, 315 F. 2d 449 (1st Cir. 1963), cert. den. 375 U. S. 820 (1964), and cases cited at 315 F. 2d 449, 455-456.

Where the *precise* matters of which a private plaintiff complains were distinctly put in issue and directly determined in the Government action, then the prior judgment or decree is admissible as an estoppel for the period of time there involved, since the doctrine of estoppel is satisfied. Such is not the case here. Petitioners' complaint of denial of first run or a reduced clearance during 1952-1961 certainly was not distinctly put in issue and directly determined in the *Paramount* case, which related to facts as of 1945.

None Of The Exhibitor Defendants In These Actions Was A Defendant In The Paramount Case.

Where some of the defendants in the subsequent private suit were parties to the Government suit and some were not, a situation is presented where admission of the decrees even with instructions limiting them to defendants who were in the Government suit may be reversible error. As a practical matter, no instruction can cure the prejudice done to those defendants against whom the decrees are not admissible. See *Krulewitch*

v. United States, 336 U. S. 440, 453 (1949) (Concurring opinion).

In *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* 190 F. 2d 951, 958 (2nd Cir. 1951), cert. den. 342 U. S. 926 (1952), the court relied upon the differences in parties to the two actions in holding that the *Paramount* decrees were inadmissible, stating:

> "The fact that plaintiff now concedes that Columbia and Universal were not parties to the present conspiracy and concededly Shea and McFaul were not parties to the original Paramount action also indicates that that case is not controlling here."

The Tenth Circuit, in *Paramount Film Distributing Corp. v. Village Theatres, Inc.*, 228 F. 2d 721, 726-727 (1955), (supra), reversed a jury verdict for the plaintiff because one of the *Paramount* decrees was admitted and the later suit involved different parties defendant and different time periods than those with which *United States v. Paramount*, (supra), was concerned.

The foregoing comparison of certain aspects of the *Paramount* case with these actions shows that no matter which arose here was directly determined in *United States v. Paramount*, (supra). Therefore, no estoppel arises which permits the introduction of the *Paramount* decrees into evidence in these cases.

II

EVEN IF ADMISSIBLE, THE DECREES TOGETHER WITH THE OTHER EVIDENCE DO NOT PERMIT THE SUBMISSION OF COUNT I TO A JURY.

The trial court directed a verdict for the defendants on Count I. The petitioners here contend that the other evidence plus the decrees would have been sufficient to make a jury case as to Count I.

Except for the *Paramount* decrees, there was no significant item of evidence offered by petitioners which was rejected by the trial court. Nevertheless, there was no evidence to establish the existence of a nationwide conspiracy during the damage period. Significantly, the Government in the *Paramount* case heard evidence as to ninety two cities and found evidence of nationwide common design through control of theatres by the five "major" defendants. In the instant cases, the only comprehensive proof pertained to the Atlanta situation, and evidence as to nationwide common design is entirely lacking.

The petitioners, in fact, rely on the *Paramount* decrees to establish the alleged national conspiracy. This was recognized by the trial judge who indicated that he felt that whether Count I could go to the jury depended on the admissibility of the decrees. Even so, the decrees are offered solely for the purpose of proving a national conspiracy as of 1945. Thus, even with the decrees in evidence, petitioners would be required to prove a national conspiracy which had an impact on petitioners during 1952-1961. Since the decrees are no evidence of such a conspiracy, they would not require the submission of Count I to the jury.

III

PETITIONERS' REASONS FOR THE GRANT OF THE WRIT OF CERTIORARI ARE WITHOUT MERIT.

There Is No Conflict Among The Circuits As To The Interpretation Of This Court's Opinion In Theatre Enterprises.

Petitioners contend that various courts have advanced differing interpretations of this Court's opinion in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537 (1954). There is no conflict among the circuits which have considered the matter.

In *Theatre Enterprises* the plaintiff had charged a nationwide conspiracy as to runs and clearances and the carrying out of that conspiracy by licensing pictures for first run exhibition in Baltimore to theatres located downtown, some of which were affiliated with the defendant distributors, and refusing to license pictures for first run exhibition to plaintiff's neighborhood Crest Theatre. That theatre opened and the damage period commenced in 1949.

As in the instant cases, the crux of that case was a claimed conspiracy to deny first run (there in Baltimore — here in Atlanta) to plaintiff. In *Theatre Enterprises* at the conclusion of the evidence, and just before all parties rested, the trial judge admitted selected excerpts from the decrees and nothing else. The Court then charged the jury as to their effect. Both plaintiff and defendants took exceptions.

The jury found for the defendants. On appeal plaintiff urged, among other things, that the trial court had erred in circumscribing its use of the *Paramount* decrees. Defendants, on the other hand, urged that the decrees were not admissible at all and, in any event, that the handling of the decrees by the trial court was more than plaintiff was entitled to receive.

It was in this context that this Court said that it did not agree with petitioner's contention that the handling of the decrees was so superficial as to deprive it of the benefits conferred by Section 5. The Court decided only the narrower question presented and merely held "that petitioner was entitled to no greater benefit than the trial judge gave it," stating at 346 U. S. 537, 543:

> ". . . The trial judge instructed, in effect, that the Paramount decrees alone could not support a recovery by petitioner; additional evidence was required to relate the presumed *Paramount* conspiracy to Baltimore and to the claimed damage period. . . . The Paramount Case involved a conspiracy found to exist as of 1945, which was enjoined no later than June 25, 1948; but the conspiracy alleged here involves a claimed damage period running from February 1949 to March 1950. Indeed the relevancy of *Paramount* to the instant case is slight. We need not pass on respondents' contention that petitioner was entitled to no benefit at all from the earlier decrees. We merely hold that petitioner was entitled to no greater benefit than the trial judge gave it."

It thus appears that this Court would have held the *Paramount* decrees to have been improperly admitted if resolution of that question had been necessary to its decision. Otherwise, it would not have said "Indeed the relevancy of *Paramount* to the instant case is slight."

Since *Theatre Enterprises*, (supra), the First Circuit in *International Shoe Machine Corp. v. United Shoe Machinery Corp.*, 315 F. 2d 449 (1963), cert. den. 375 U. S. 820 (1964), and *Park Neponset Corporation v. Smith*, 258 F. 2d 452 (1958), has held prior government decrees inadmissible under the principles of Section 5 of the Clayton Act where the damage period in the subsequent private action has commenced subsequent to the period as to which the prior government decree found a conspiracy to exist.

The Second Circuit in *Webster Rosewood Corp. v. Schine Chain Theatres, Inc.*, 263 F. 2d 533 (2nd Cir. 1959), cert. den. 360 U. S. 912 (1959), dealt with the question whether the plaintiff had been prejudiced by the limiting effect given a prior Government decree by the trial judge, who tried the case without a jury. The Second Circuit Court merely held, as did this Court in *Theatre Enterprises*, (supra), that the plaintiff was entitled to no more than what he had received in respect of the prior Government decree.

The Tenth Circuit in *Paramount Film Distributing Corp. v. Village Theatre*, 228 F. 2d 721 (10th Cir. 1955), and the District of Columbia Circuit in *Orbo Theatre Corporation v. Loew's Incorporated*, 156 F. Supp. 770 (1957), aff'd 261 F. 2d 280 (1958), cert. den. 359 U. S. 943 (1959), both held prior government decrees inadmissible in a suit where the conspiracy was alleged to have

commenced subsequent to the time period with which the previous Government suit was concerned.

The Fifth Circuit in these actions stated at 327 F. 2d 365, 369:

> "When we consider that the conspiracy here declared upon commenced three years later than that before the Supreme Court in *Theatre Enterprises*, and in view of the absence of any other evidence to support the claims in Count one, we conclude that whatever relevance there may have been in *Theatre Enterprises* would have vanished completely by the time of, and under the circumstances of, the filing of the instant suits."

Certainly none of the holdings just discussed conflicts with *Theatre Enterprises* nor do the holdings conflict among themselves. We know of no other circuit courts which have decided this particular matter nor has any been called to our attention.

The Result Reached In These Actions Does Not Circumvent The Paramount Decrees.

Petitioners argue that the method of distribution of feature films in Atlanta in 1945, whereby distributors licensed first run Atlanta showings in larger downtown theatres followed by subsequent showings in neighborhood theatres after periods of clearance, was enjoined by the *Paramount* case but was nevertheless continued through the damage period in these actions in disregard of the *Paramount* decrees. As we have in-

dicated, however, there was no adjudication in the *Paramount* case that the system of runs and clearances in effect in Atlanta in 1945 was invalid. Even had there been such an adjudication, the clearances in effect in 1945 were drastically different from those in effect during 1952-1961 (R. 125, 126, 193, 319, 480, 481). Nor was there an adjudication that it was unlawful for a distributor to license the first run of a motion picture in a large downtown theatre where possible.

Petitioners' complaint that the system of runs and clearances in effect in Atlanta during 1952-1961 violated the anti-trust laws was submitted to the jury in Count II in these cases alleging a local conspiracy. Except for the decrees, petitioners offered the same evidence as to both counts and all was received by the trial court. The jury finding for Respondents in Count II (as to which petitioners do not claim the decrees were admissible) has affirmatively established the validity of the Atlanta system of runs and clearances in 1952-1961.

The Result Reached In These Actions Follows The Mandate Of Congress.

Petitioners' final argument is that Congress in Section 5 of the Clayton Act meant to reduce an anti-trust plaintiff's burden of proving a conspiracy in restraint of trade in instances where such a conspiracy which had damaged that plaintiff had already been proven by the Government and that courts must bear in mind the Congressional directive when applying Section 5. To assist the plaintiff and, at the same time, prevent the haphazard misuse of prior Government decrees, Congress in Section 5 made the admissibility of such decrees

specifically subject to the requirements of estoppel. Those requirements were simply not met in these actions, and the trial court had no choice but to reject the decrees.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

_____

Robert S. Sams

_____

Tench C. Coxe
Attorneys for Respondents:
Evans Theatre Corp., Paramount Film Distributing Corp., Metro-Goldwyn-Mayer, Inc., Twentieth Century-Fox Film Corp., Warner Bros. Pictures Distributing Corp., RKO Radio Pictures, Inc., United Artists Corp., Universal Film Exchanges, Inc., and Columbia Pictures Corp.

Of Counsel:
Troutman, Sams, Schroder
& Lockerman
1605 William-Oliver Bldg.
Atlanta, Georgia 30303

W. Colquitt Carter
Attorneys for Respondents:
Atlanta Enterprises, Inc. and
Wilby-Kincey Service Corp.

Of Counsel:
Bryan, Carter, Ansley
& Smith
C & S National Bank Bldg.
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I, ROBERT S. SAMS, of counsel for respondents, do hereby certify that I have served a copy of the foregoing Response to the Petition for Certiorari on petitioners' counsel by depositing same in the United States mail, with Air Mail postage prepaid, addressed to each of petitioners' counsel of record at his post office address.

This —— day of September, 1964.